Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Williams and another, Executors of John Jobbins v. *Byrnes and Byrnes, from New South Wales; delivered March 4th*, 1863.

Present:

LORD CHELMSFORD.
LORD JUSTICE TURNER.
SIR JOHN T. COLERIDGE.

THIS is an Appeal from a Judgment of the Supreme Court of New South Wales. The Respondents were the Plaintiffs in the suit, and the Appellants the Defendants. The facts and the pleadings were shortly as follows:—

Jobbins and one Hardy were in some way, not stated precisely, connected in a scheme for the erection of a mill, which was to be worked by a steam-engine. Hardy was without funds or independent credit to procure the engine, and Jobbins gave him, as is alleged and not denied, for the purpose of delivery to the Respondents, a writing in these words:—"I will furnish Mr. Hardy with funds for the purchase of a steam-engine and machinery for a flour mill on his suiting himself with the same, and notifying the purchase to me." This paper was signed by Jobbins, but not addressed on its face to any one. Hardy delivered this paper to the Respondents, and after some negotiation came to an agreement with them for a steam-engine to be constructed in England and sent out to the Colony. After the negotiation, and before the arrival of the engine, Jobbins conversed with one of the Respondents on the subject, and inquired what the price would be, and was told that could not yet be ascertained, to which he replied, "All right; when it arrives, there's your money." He subsequently

died; the engine arrived; the Appellants refused to accept or pay for it, and it has never been delivered.

The Declaration is in *assumpsit*, and in the first count treats Jobbins as liable on a guaranty for the payment, if Hardy should make default. To this, among other pleas, *non assumpsit* is pleaded, and upon the argument this count and this view of the contract were abandoned. The second count is framed so as to charge Jobbins with a primary liability. It states that Hardy was desirous of obtaining a steam-engine, but was unable to pay for the same out of his own funds, or obtain the same on his own credit; that Jobbins knowing this, to enable him to obtain it, gave him for the purpose of being given to the Respondents, an instrument in writing, signed by him, which it then sets out in terms as above stated; that Hardy gave them the instrument, and they therefore, and only on the basis thereof, agreed with Hardy to obtain for him from England a steam-engine, and pay all necessary expenses for the same, all which premises were then notified to Jobbins. The count then alleged the performance of this agreement on their part, and the expenditure of 3,000*l.* in such performance, with the performance also of all conditions precedent, and that all things had happened which would entitle them to be paid the money so expended, concluding with a denial that Hardy, or Jobbins, or the Appellants had paid the same.

There was no plea of *non assumpsit* to this count, but there was a plea framed on the 17th Section of the Statute of Frauds, upon which issue was joined. At the trial the question of law which this pleading raised was reserved, and the jury found for the Respondents on the fact, and gave damages for the full value of the engine with all expenses, taken at the time of its arrival in the Colony 2,953*l.* 10*s.* 6*d.* Upon the argument before the Court, consisting of two Judges only, it was equally divided; the verdict therefore stood, and Judgment has been entered up accordingly.

In the argument before their Lordships the objection upon the Statute of Frauds has been again relied on, and they are of opinion that it must prevail. The 17th Section of the Statute (now incorporated into the 7th Section of the 9 Geo. IV, cap. 14) requires that "some

note or memorandum of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized." In the present case the name of the person with whom the contract was to be made does not appear in the instrument, nor on any other paper connected with it, and capable of being considered as completing with it a note or memorandum of the transaction. Whether this instrument is to be considered as evidence of the contract, or only of a proposal which would become a contract upon the acceptance of it by the Byrnes, the question is still the same, whether without the insertion of their names in it, or in some other paper connected with it, there is a sufficient note or memorandum in writing of the bargain to satisfy the Statute? Apart from authority, and looking only to the words of the enactment, and the mischiefs which it was intended to prevent, their Lordships think the question must be answered in the negative. The words require a written note of a bargain or contract; the Statute clearly making no distinction between these two words. This language cannot be satisfied unless the existence of a bargain or contract appear evidenced in writing, and a bargain or contract cannot so appear unless the parties to it are specified, either nominally or by description, or reference. It is true that the Statute does not require the whole bargain in all its terms to be stated; it stipulates only for a note or memorandum of it, signed by the party to be charged, but it does in effect require that the essentials, *i.e.*, all those things without which it can be no bargain at all, shall be. Upon this principle it was that the Courts determined, under the 4th Section, that the consideration of an agreement must appear on the face of the memorandum of a guarantee, or be matter of necessary implication from its language. It was obviously the intent of the Statute to prevent, as far as it could conveniently, the mischief of being obliged to have recourse to oral evidence in regard to the transactions within it. But it would fail to accomplish its object in a most material particular, and in one in which its requirement might always be most easily satisfied, if it did not impose the necessity of stating the name of the seller as well as of the buyer; of the party by whom goods were to be supplied, as well as of him to whom

they were to be supplied, under the 17th Section, or of the party to be guaranteed as well as of him who is to guarantee, under the 4th. Unless this be done, oral evidence must be had recourse to, and the risk incurred that a party may be sued by one with whom he had never intended to have any transaction, a matter of the greatest importance under many supposable circumstances.

Much of the difficulty which has been felt in this and similar cases, arises from not carefully bearing in mind the distinction between the necessary elements of a simple contract at common law, especially where it becomes complete, not at once, but by successive steps, and the requisites to make it a ground of action, which the Statute imposes.

Their Lordships do not here enter into a consideration of the authorities which were cited, because they do not understand this general reasoning to be disputed; but only that its applicability to a case like the present is denied. It is said that when this Memoraudum was made, it was not known whether the Messrs. Byrnes would come to any agreement at all; that it must often happen that proposals of this kind are intended to be submitted to a variety of persons in succession; that it can never be nccessary to state more than is known at the time when the note is made, and that to require more is in effect to forbid the making of any such contracts at all. Their Lordships do not rely in answering this argument upon the fact in the present case, that the Count alleges that the paper was given to Hardy, specifically to be given to the Byrnes, and that as it contained, therefore, a proposal specifically to them, nothing would have been easier than to have addressed it in terms to them, as would certainly have been done if it had assumed the form of a letter. But it seems to their Lordships that the argument rests on the fallacy of supposing that the Statute, as they construe it, could only be satisfied by the name of the Byrnes having been written on the paper simultaneously with the rest of the particulars, and on the same paper. The contrary of this, however, has been well established, and it is well known that a large proportion of many transactions unquestionably within the Statute are of a kind which grow into bargains and agreements in the course of a correspondence or an oral nego-

tiation more or less prolonged. It is surely a valid objection to this argument of the Respondents, that it would tend to exclude all such from the operation of the Statute. Their Lordships do not doubt that a promise in writing signed to pay any one unnamed, who shall furnish goods to the writer, or to a third person making default, will become a binding contract with any one, whosoever he may be, who shall accept the promise in writing and furnish the goods. But in such case the requisition of the Statute will have been complied with. It was also urged that the present case was within the principle of the decisions which have established the liability of any one who advertises generally a reward for information to any person not named in the advertisement, who shall first give the information asked for. Their Lordships do not question the authority of those cases, but the answer is obvious; they are cases at common law, and there is nothing to prevent the whole transaction from being proved by oral evidence; it is a mere circumstance that the advertisement is in writing; and no case, they believe, has ever been decided, where by the terms of the offer the information was not to be given within a year, or where it asumed the character of a guaranty. Such a case might have borne more closely on the present.

Their Lordships, therefore, do not agree with the Chief Justice in the distinction which he labours, in his very able Judgment, to establish between the present case, and that of Williams *v* Lake (29 L. J. N. S. Qu. B. 1). They think that case, although upon the 4th Section, a direct authority in the present, and it was not disputed by the learned Chief Justice, or the Counsel here, but that it was well decided. It is certainly in conformity with many previous decisions, which they think it unnecessary now to introduce into this Judgment. They refer, however, specially to the Judgment of Mr. Justice Blackburn, in which he illustrates strikingly from the facts before him the mischiefs of a contrary decision.

Their Lordships are of opinion, therefore, on this ground that the Judgment of the Court below cannot be sustained. It is proper, however, to observe that, in two other respects it appears to them that there has been a miscarriage in the Court below. In the first place, assuming that the memorandum has been properly construed, and that this was, in truth, a

transaction between the Respondents and Jobbins for the sale or supply of a steam-engine to him by them, it is clear that engine has never been delivered or accepted. The Respondents still retain their property in it, and have only a right to recover the damages sustained by the refusal to accept. But the jury have been instructed, as if in an action for goods sold and delivered, to give the whole value of the engine. In the second place, their Lordships are clearly of opinion, and they collect that it was so considered by the Counsel for the Respondents, that the instrument has not received its proper construction, and the action, in consequence, has been misconceived. They think that Jobbins contracted not to pay for the engine, but to furnish Hardy with the funds to enable him to pay; and that, although the Byrnes had never been paid by him, there would have been a good defence to the action properly framed, if it could have been shown that Jobbins had furnished him with the funds. As there was no plea of *non assumpsit* to this Count, it might not, perhaps, have been open to the Appellants to avail themselves of this error on the present record.

Their Lordships observe that at the close of the trial, it was arranged that, if necessary, the pleadings might be amended, to raise the point in question; it may be questionable whether this arrangement would, in strictness, extend to an amendment at the present stage of the cause, or to any amendment so large as would be necessary to obviate these objections. This, however, does not limit the discretion of their Lordships, and they think that in advancement of the justice of the case, it will be their duty humbly to recommend to Her Majesty that the Judgment of the Court below be set aside; that the parties shall be at liberty, on both sides, to amend their pleadings, and proceed to a new trial; that the Appellants shall have their costs of the proceedings in the Court below, and of this Appeal; and that the costs of the amendment should abide the event of the new trial. It would have been in course to have given the Appellants these costs also, but their Lordships do not find that the objections mentioned above were taken in the Court below.